Soh Poh Sheng v Malayan Banking Bhd

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO J-02(IM)-444–03 OF 2016
ABANG ISKANDAR, ZALEHA YUSOF AND KAMARDIN HASHIM JJCA
25 JANUARY 2017

Limitation — Enforcement of judgment — Bankruptcy proceedings — Judgment in default entered against appellant in 2001 — Respondent initiated bankruptcy proceedings against appellant in 2013 — Whether respondent's action caught by limitation of 12 years pursuant to s 6(3) of the Limitation Act 1953 — Whether respondent should filed 'nunc pro tunc' application for leave to enforce judgment in default — Limitation Act 1953 s 6(3)

A judgment in default ('JID') was entered against the appellant on 26 September 2001. Based on the JID, the respondent initiated bankruptcy proceedings against the appellant on 20 August 2013. The respondent had also filed an application for 'nunc pro tunc' vide encl 21R for leave to enforce the JID against the appellant vide the bankruptcy proceedings. On 30 July 2015, the court allowed the plaintiff's application in encl 21R. In response, the appellant filed an application to set aside the order dated 30 July 2015 and averred that the plaintiff's application for leave to enforce JID was time-barred as it was filed beyond the statutory limit of 12 years pursuant to s 6(3) of the Limitation Act 1953 ('the Act'). The learned judicial commissioner ('JC') dismissed the appellant's application, hence the present appeal. The issue was whether the action by the respondent was caught by the embargo set out by the Act as it was alleged by the appellant that the respondent had so acted after 12 years had lapsed from the time the judgment was first obtained against the appellant by the respondent.

Held, dismissing the appeal with costs of RM8,000 subject to payment of allocator fees:

(1) The respondent was not caught by the limitation of 12 years. The bankruptcy proceedings were initiated in 2013, it was within time as the respondent had acted after 11 years and 10 months from the date of judgment in 2001. As such, the contention that the present action was taken up after 12 years had elapsed so as to trigger the limitation against the respondent could not be sustained as it lacked the necessary factual foundation in order to succeed (see paras 19 & 26).

(2) As regards to the 'nunc pro tunc' application, in the circumstances of the case, there was no need for the respondent to have so applied for retrospective leave, in order to be in compliance with the apex court ruling on prior leave requirement that was pronounced in the case of *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1 because the ruling in the said case was prospective in effect. It was only out of abundance of caution that the respondent had filed in the application for retrospective leave, the 'nunc pro tunc' order granted by the High Court in favour of the respondent. If indeed the learned JC had erred, he had erred on the side of caution and there was no substantial miscarriage of justice that warranted the court to invoke appellate powers (see paras 20 & 25).

[Bahasa Malaysia summary

Penghakiman ingkar ('PI') telah dimasuki terhadap perayu pada 26 September 2001. Berdasarkan PI tersebut, responden telah memulakan prosiding kebankrapan terhadap perayu pada 20 Ogos 2013. Responden juga telah memfailkan permohonan untuk 'nunc pro tunc' melalui lampiran 21R bagi kebenaran menguatkuasakan PI tersebut terhadap perayu melalui prosiding kebankrapan. Pada 30 Julai 2015, mahkamah membenarkan permohonan plaintif dalam lampiran 21R. Sebagai jawapan, perayu telah memfailkan permohonan untuk mengetepikan perintah bertarikh 30 Julai 2015 dan menegaskan bahawa permohonan plaintif untuk kebenaran menguatkuasakan PI tersebut telah luput had masa kerana ia telah difailkan melebihi had statutori 12 tahun menurut s 6(3) Akta Had Masa 1953 ('Akta tersebut'). Pesuruhjaya kehakiman yang bijaksana ('PK') telah menolak permohonan perayu, justeru rayuan ini. Isu adalah sama ada tindakan oleh responden terjatuh di bawah embargo yang ditetapkan oleh Akta tersebut sepertimana dikatakan oleh perayu bahawa responden telah bertindak selepas 12 tahun berlalu dari masa penghakiman itu pertama kali diperolehi terhadap perayu oleh responden.

Diputuskan, menolak rayuan dengan kos RM8,000 tertakluk kepada bayaran fi alokatur:

(1) Responden tidak terikat oleh had masa 12 tahun. Itu. Prosiding kebankrapan itu telah dimulakan pada 2013, ia dalam tempoh masa kerana responden telah bertindak selepas 11 tahun dan 10 bulan dari tarikh penghakiman pada 2001. Oleh itu, hujah bahawa tindakan ini telah diambil setelah 12 tahun berlalu untuk mencetuskan had masa terhadap responden tidak boleh dikekalkan kerana ia tidak mempunyai asas faktual yang diperlukan untuk berjaya (lihat perenggan 19 & 26).

(2) Berhubung permohonan 'nunc pro tunc', dalam keadaan kes, tiada keperluan untuk responden mengguna pakai kebenaran kebelakang, bagi tujuan pematuhan dengan mahkamah tertinggi yang memutuskan tentang keperluan kebenaran terdahulu yang dinyatakan dalam kes

Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1 kerana keputusan dalam kes tersebut adalah bersifat prospektif. Ia hanya daripada sikap berhati-hati yang responden telah memfailkan permohonan untuk kebenaran kebelakang itu, perintah 'nunc pro tunc' telah diberikan oleh Mahkamah Tinggi menyebelahi responden. Jika sememangnya PK yang bijaksana telah terkhilaf, beliau terkhilaf berhubung sikap berhati-hati dan tiada pelaksanaan yang tidak adil yang substantial sehingga mewajarkan mahkamah menggunakan kuasa rayuan (lihat perenggan 20 & 25).]

Notes

For cases on enforcement of judgment in general, see 9 *Mallal's Digest* (5th Ed, 2015) paras 2397–2407.

Cases referred to

AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal [2013] 3 MLJ 179; [2013] 3 CLJ 317, FC (refd)

Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1, FC (distd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (folld)

Spectrum Plus Ltd; National Westminster Bank plc, Re v Spectrum Plus Ltd and others [2005] 4 All ER 209; [2005] UKHL 41, HL (folld)

Legislation referred to

Bankruptcy Act 1967
Companies Act 1965 s 236(2)(a)
Limitation Act 1953 s 6(3)
Rules of Court 2012 O 46 r 2(1)(a)
Rules of the High Court 1980 O 46 r 2

Appeal from: Civil Suit No 22–278 of 2001 (High Court, Johor Bahru)

Rajan Navaratnam (James Au and Sharifah Munirah with him) (Rajan Navaratnam) for the appellant.
Hoi Jack S'ng (Lee Hishammuddin Allen & Gledhill) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

BACKGROUND OF THE CASE

[1] On 26 September 2001, a judgment in default ('JID') was entered against Soh Poh Sheng ('the second defendant').

[2] Based on the JID, Malayan Banking Bhd ('the plaintiff'), initiated a bankruptcy proceeding against the second defendant on 31 July 2002 vide Johor Bahru High Court Bankruptcy No 29–3392 of 2002 ('first bankruptcy proceedings'). A

[3] The first bankruptcy proceedings were initiated within six years from the date of the JID. B

[4] A bankruptcy search revealed that the second defendant was adjudged bankrupt by Mayban Finance Bhd on 24 September 2003. Hence, the plaintiff withdrew the first bankruptcy proceedings. C

[5] On 9 March 2006, the plaintiff then filed a proof of debt to claim the amount owing by the second defendant. D

[6] In 2007, the plaintiff discovered that the receiving order and adjudication order ('ROAO') dated 24 September 2003 against the second defendant were rescinded and annulled on 23 September 2004.

[7] From 2002–2007, there were several negotiations for settlement of the debt due and owing between the first and the second defendants with the plaintiff. However, a final settlement was not reached between the plaintiff and the second defendant. E

[8] On 20 August 2013, the plaintiff initiated a bankruptcy proceedings against the second defendant vide Johor Bahru High Court Bankruptcy No 29–3049–08 of 2013 ('the second bankruptcy proceedings'). F

[9] On 14 January 2015, the second defendant's application for an extension of time to set aside the JID was dismissed by the court. As there was no appeal by the second defendant, the JID is therefore final. G

[10] The plaintiff filed an application for *nunc pro tunc* vide encl 21R for leave to enforce the JID against the second defendant vide the second bankruptcy proceedings. H

[11] On 30 July 2015, the court allowed the plaintiff's application in encl 21R. I

[12] The second defendant averred that the plaintiff's application for leave to enforce the JID was time-barred as it was filed beyond the statutory limit of 12 years pursuant to s 6(3) of the Limitation Act 1953. Therefore, the second

A defendant, vide encl 26R filed an application to set aside the order dated 30 July 2015.

[13] The judicial commissioner ('JC') dismissed the second defendant's application with costs of RM4,000. Thus this appeal by the second defendant to the Court of Appeal.

B

THE APPEAL

[14] In this appeal, the second defendant submitted before us, the following issues, namely:

C

(a) there is no provision in law for the plaintiff to make leave application for *nunc pro tunc* under O 46 r 2(1)(a) of the Rules of Court 2012 as it does not provide for an application to be made either *nunc pro tunc* or for retrospective leave. Instead, it is only applicable prior to issuance of a writ for execution and not after a writ for execution has been issue;

D

(b) the application for leave was time-barred as it was made after 12 years; and

E

(c) the plaintiff cannot rely on s 236(2)(a) of the Companies Act 1965 as the second defendant is an individual and hence only the Bankruptcy Act 1967 applies. However, the Bankruptcy Act 1967 does not provide for leave to be granted *nunc pro tunc* under any circumstances before an adjudicating order is made.

F

[15] The plaintiff on the other hand contended that the catalyst for applying for *nunc pro tunc* leave was a change in law. At the time the plaintiff commenced the bankruptcy proceedings, O 46 r 2(1)(a) was not applicable to bankruptcy proceedings. Thus, no leave was first obtained despite six years have lapsed since the date of judgment. That was the state of the law as enunciated in the apex court's decision in the case of *AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal* [2013] 3 MLJ 179; [2013] 3 CLJ 317 where it was held that a bankruptcy action does not fall within the ambit of a writ of execution within the meaning of O 46 r 2 of the Rules of the High Court 1980. Premised on that ruling, the issue of whether a judgment creditor was required to obtain prior leave of court before it could begin a bankruptcy proceeding based on a final judgment which was obtained more than six years prior did not therefore arise. In short, no such leave was necessary to be obtained by the judgment creditor.

G

H

I

[16] However the law had been substantially changed since 2015. While the bankruptcy proceedings were ongoing, the Federal Court in *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1 ('*Dr Shamsul Bahar*'s case') decided that the leave under O 46 r 2(1)(a) is now

required before a plaintiff can enforce a judgment via bankruptcy proceedings where more than six years have lapsed since the date of the judgment.

[17] So, in order to avoid the bankruptcy proceedings being rendered void, as no prior leave is obtained, the plaintiff had thus filed this application. It was allowed by the learned JC sitting in the High Court at Johore Bahru. In consequence thereof, a *nunc pro tunc* order was granted giving leave to the plaintiff as judgment creditor to execute the judgment that was obtained in 2001 (more than six years before the application was made by the plaintiff).

[18] We would deal with the issue of whether this action by the plaintiff was caught by the embargo set out by the Limitation Act 1953 as it was alleged by the second defendant herein that the plaintiff had so acted after 12 years had lapsed from the time the judgment was first obtained against the second defendant by the plaintiff. For this matter, we must look at the chronology of the relevant events for its historical journey.

[19] Premised on that scrutiny, it was clear to us that the plaintiff was not caught by the limitation of 12 years. It had been shown to us that it was within time as it had acted after 11 years and 10 months from the date of judgment in 2001. As such, the contention that this action was taken up after 12 years had elapsed so as to trigger the limitation against the plaintiff could not, with respect, be sustained as it lacked the necessary factual foundation in order to succeed.

[20] The plaintiff had applied for leave, *nunc pro tunc.* A Latin term, pronounced as *nuhnk proh tuhnk,* literally means 'now for then' in the English language. In legal terms, it means changing back to an earlier date of an order, judgment or filing of a document. As regards to this *nunc pro tunc* application, in the circumstances of this case, we were of the view that, in fact, there was no need for the plaintiff to have so applied for retrospective leave, in order to be in compliance with the apex court ruling on prior leave requirement that was pronounced in the *Dr Shamsul Bahar* case. We had so ruled because the ruling in *Dr Shamsul Bahar* case was prospective in effect. Indeed, a reading of the said apex court's decision did not suggest that it was meant to be retrospective in effect. In other words, it seeks to operate prospectively, meaning to say that its decision is only applicable to cases which shall arise after the date of pronouncement of its decision by the apex court. It is used in opposition to a retrospective law and does not in any way interfere with what has already passed.

[21] If indeed it was to be applicable retrospectively, it could only be so applied in a very limited and circumscribed circumstance. We found support for holding such a view premised on few decided cases of high authority.

[22] First, we would refer to the speech by Lord Nicholls of Birkenhead, in the English House of Lords decision in the case of *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] 4 All ER 209; [2005] UKHL 41, where the learned Law Lord had said:

> A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular disputes are concerned.
>
> ...
>
> People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences.
>
> Prospective overruling takes several different forms. In its simplest form prospective overruling involves a court giving a ruling of the character sought by the bank in the present case. Overruling of this simple or 'pure' type has the effect that the court ruling has an exclusive prospective effect. This ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date, continue to be governed by the law as it was conceived to be before the court gave its ruling.

[23] Back to our own shores, in 2006 the Federal Court had, in the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 through the speech by learned Justice Abdul Malek Ahmad FCJ (as he then was), ruled as follows:

> To my mind, the correct proposition would be that any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or at the appellate stage. It certainly does not apply to cases already disposed of at the highest appellate level.

[24] Applying the principle distilled from the above-cited cases, it is clearly an undisputed fact that there was no pending appeal pertaining to this case before us. That being the case, it was a case which had, for all intent and purposes been finally disposed of. What was left was the execution of the final judgment which had been the truth between the parties. As such, this case was not affected in any way by the prospective ruling in the *Dr Shamsul Bahar* case. In other words, no prior leave was needed for it to initiate execution proceedings against the second defendant although six years had gone past after judgment was obtained against the second defendant.

[25] We noted that the decision in *Dr Shamsul Bahar* case was delivered when this case had not completed its execution proceedings, but at the time when execution was initiated, no leave was required under the then existing regime. It was only out of abundance of caution that the plaintiff had filed in the application for retrospective leave, the *nunc pro tunc* order granted by the High Court sitting at Johore Bahru in favour of the plaintiff. If indeed the

learned JC had erred, he had erred on the side of caution and with respect we did not see any miscarriage of justice, let alone substantial miscarriage of justice, being occasioned against the second defendant that would otherwise have warranted us to invoke our appellate powers.

[26] We saw no cogent reasons as to why the decision of learned JC ought to be disturbed. This order was apparently sought in abundance of caution. It is clear that when the bankruptcy proceedings were initiated in 2013, it was within the 12 years allowed under the law on limitation and under the prevailing legal regime then in force, that no leave was required for execution proceedings of a judgment that was obtained against the second defendant more than six years before execution proceedings were initiated against him.

CONCLUSION

[27] In the upshot therefore, having considered the submissions by both learned counsel, we were unanimous in our decision that this appeal ought to be and is hereby dismissed with costs of RM8,000 as agreed costs subject to payment of allocator fees. Deposit was refunded to the second defendant, being the appellant. We had so ordered.

Appeal dismissed with costs of RM8,000 subject to payment of allocator fees.

Reported by Dzulqarnain Ab Fatar